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NO. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN E. MALLARD,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, et. al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR LEGAL SERVICES CORPORATION OF IOWA AS *AMICUS CURIAE*

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BRIEF OF *AMICUS CURIAE*

This brief is submitted by the Legal Services Corporation of Iowa as *amicus curiae* and in support of respondents.

INTEREST OF THE LEGAL SERVICES CORPORATION OF IOWA

The Legal Services Corporation of Iowa (LSCI) is a private non-profit corporation incorporated under the Iowa Nonprofit Corporation Act, Chapter 504A, Code of Iowa (1987). LSCI was incorporated in February of 1977 for the purpose of, inter alia, securing justice for and protecting the rights of low-income people throughout the State of Iowa, advancing the knowledge of legal aid among the general public, and cooperating with the state and federal courts and "any other person or group interested in the administration of justice." LSCI Articles of Incorporation.

The Legal Services Corporation of Iowa provides civil legal assistance to low-income individuals in 98 of Iowa's 99 counties. LSCI currently employs 49 attorneys and 6 paralegals to provide services to the estimated 519,000 low-income persons in the State of Iowa. In federal fiscal year 1988, LSCI provided some form of legal assistance to 20,746 low-income individuals. The services ranged from relatively brief activities such as legal counseling to more intensive state and federal court trials, appeals, and class action lawsuits.

Because of the minimal number of advocates available to provide legal services to potentially eligible individuals, [1] LSCI has restricted the types of cases that it will accept. This has been accomplished by a series of public meetings soliciting client input; letters requesting input from the private bar, LSCI staff, and service providers throughout the state; and a final "Priority Planning Conference" held in October of 1984. As a result of this process, LSCI developed a list of substantive areas which were to be given priority in providing assistance to eligible individuals. The statement of priorities, adopted by the LSCI Board of Directors in July of 1985, contained high, medium, and low priority substantive areas. Among the high priority areas were cases involving Aid to Families with Dependent Children, Medicaid, federally subsidized housing, rights

[1] LSCI's current financial eligibility policies require that the income of a family or individual be less than 125% of the 1984 federal poverty guidelines established by the U.S. Department of Health and Human Services.

of the mentally disabled, and family abuse. Low priority cases included tort matters, wills, adoptions, and prisoners' rights issues. The priority list was developed to recognize the most pressing legal needs of potential LSCI clients, and is constantly undergoing review.

In 1982, LSCI, in cooperation with the Iowa State Bar Association, created the Volunteer Lawyers' Project (VLP) as an attempt to harness the resources of private attorneys throughout the state on behalf of low-income individuals. The VLP attempts to refer cases, on an entirely pro bono basis, to attorneys who participate on the VLP panel. There are currently approximately 800 Iowa attorneys on the VLP panel. VLP attorneys closed 1452 cases in fiscal year 1988. The clients referred to VLP attorneys undergo the same income screening as do LSCI clients, and the cases handled generally reflect LSCI priorities. Intake of VLP cases is conducted in nine LSCI regional offices, and referral of the cases is accomplished by staff located in LSCI's Central Office in Des Moines.

In 1985, as a response to the decision of the Eighth Circuit Court of Appeals in *Nelson v. Redfield Lithographic Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984), the U.S. District Court for the Southern District of Iowa developed a list of attorneys practicing in that court for purposes of appointments to represent indigent individuals under 28 U.S.C. §1915 (d). Currently, any attorney admitted to practice in the Southern District of Iowa who has appeared in a non-bankruptcy federal case in the past five years is eligible for appointment. The VLP administers

the appointment system for which LSCI receives no recompense. The District Court provides the VLP with a list of eligible attorneys, which is divided alphabetically into three panels. Attorneys from the first third of the list were called upon for service in 1986, the second third in 1987, and the final third in 1988. The VLP personally contacts each attorney informing him or her of the placement.

The Legal Services Corporation of Iowa has two interests in this case. First, LSCI is organizationally committed to increasing the access of low-income individuals to the courts. The appointment system operated by the Southern District of Iowa is a means of increasing access to the courts for individuals found to be indigent under 28 U.S.C. §1915. Second, LSCI, as manager of the Volunteer Lawyers' Project, has an administrative interest in the continued operation of the current appointment system.

SUMMARY OF ARGUMENT

The federal referral system in the Southern District of Iowa operates in a manner consistent with the language and intent of 28 U.S.C. §1915 (d). The burden imposed on individual members of the bar by the federal referral system is minimal, and is made necessary by the increasing volume of pro se cases in the Southern District of Iowa, and by earlier failures to establish an adequate voluntary system.

In the absence of an effective voluntary system for representing indigent litigants, the appointment process

operated in the Southern District of Iowa is an essential method of insuring that effective and meaningful access to the courts is preserved for these litigants. The right of access to the courts has been deemed to be one of the fundamental rights protected by the Constitution, and arises from the privileges and immunities clause of article 4 of the Constitution, the first amendment, and the due process clause of the fourteenth amendment.

To fully implement the right of access to the courts, the access granted must be "adequate, effective, and meaningful." In many cases, meaningful access to the courts cannot be accomplished in the absence of the appointment of counsel. Counsel need not be appointed in every case, but in those situations where the court has reviewed the pro se complaint filed by an indigent litigant, and determined that the litigant will be incapable of proceeding adequately pro se, counsel should be appointed by the court. In many cases, effective representation can be achieved only if counsel is appointed.

The imposition of time and financial burdens on individual attorneys will not lead to a lack of conscientious representation of indigent litigants. The time commitment involved in an appointment under 28 U.S.C. §1915(d) is generally not so great as to materially limit the lawyer's ability to represent the client. The canons of ethics of the legal profession, in addition to the general professional competence of the bar, insure that conscientious representation will be maintained, even in situations where the attorney is appointed to represent an indigent litigant.

Appointment of counsel is consistent with the long-standing goal of the legal profession to promote justice. The decision of the Eighth Circuit Court of Appeals should be affirmed.

ARGUMENT

APPOINTMENT OF ATTORNEYS TO REPRESENT INDIGENT LITIGANTS UNDER 28 U.S.C. §1915 (d) INSURES MEANINGFUL ACCESS TO THE COURTS

A. The Burden Imposed By The Appointment System Does Not Place Undue Pressures On Attorneys Requested To Serve.

The central claim presented by petitioner focuses on the rights of an attorney to refuse a proffered "appointment" under 28 U.S.C. §1915(d). Petitioner's argument centers on his literal interpretation of the word "request" as a precatory invitation for members of the bar to serve the needs of indigent litigants. The focus of petitioner's argument obscures the interests of the individuals addressed in §1915(d) — those who are unable to afford counsel. LSCI urges the Court to decide the discrete issue presented in light of this larger context.

The courts have long wrestled with the necessity of appointment of counsel in both the criminal, *Powell v. Alabama*, 287 U.S. 45 (1932), and civil contexts. The circuit courts, although noting that there is no constitutional right to the appointment of counsel in civil proceedings, *Poole v. Lambert, 819 F.2d 1025, 1028 (11th Cir.*

1987); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Nelson*, 728 F.2d at 1004; *Peterson v. Nadler*, 452 F. 2d 754, 757 (8th Cir. 1971), have struggled to make counsel available to indigent individuals with potentially meritorious claims. In *Poole*, for example, the court urged the district courts in the circuit to develop "imaginative and innovative" methods of addressing complaints filed by low-income individuals, typically prisoners. 819 F.2d at 1028. In *Whisenant*, the court noted that denial of counsel to an indigent litigant could potentially lead to the denial of a fundamentally fair trial, and noted the duty on the part of the bar to represent indigent plaintiffs with colorable claims. 739 F.2d at 163-164. [2]

The Eighth Circuit Court of Appeals has acted forcefully to assure that the rights of low-income litigants are protected. In *Peterson*, the court recognized that §1915(d) gave the district court the power to appoint counsel for indigent litigants. 452 F.2d at 757. The *Nelson* court built upon the *Peterson* decision and, writing under the court's "general supervisory power over the district courts," ordered chief judges throughout the circuit to:

> seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

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[2] It is notable that this Court has appointed counsel in cases where an individual was proceeding in forma pauperis. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 338 (1963); Supreme Court Rule 46.6.

728 F.2d at 1005; *cf. In the Matter of Snyder*, 734 F.2d 334, 339 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 634 (1985) (every licensed attorney has an implied obligation to perform pro bono work). The Federal Practice Committee of the Iowa State Bar Association, in cooperation with the district courts, attempted, pursuant to the court's mandate in *Nelson*, to solicit attorneys to participate voluntarily in handling pro bono cases, but the result of this solicitation effort was negligible. Thus, the district court was forced to use a mandatory system. At first, this system focused exclusively on attorneys with extensive federal court experience. This system proved too burdensome on the relatively few active federal court practitioners and was replaced by the current system in February of 1986.

Although the appointment system presents those appointed with a serious challenge, the task confronting the bar is made more manageable by the screening process that occurs under §1915 prior to the time counsel is "requested" to serve or is "appointed" by the district court. In *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), the court adopted criteria for determining whether the appointment of counsel was necessary. The factors considered included the merits of the claim, the existence of underlying credibility disputes and involved factual issues, the capability of the indigent litigant to present the case, and the complexity of the legal issues presented. *Id.* at 887-888; *see McNeil vs. Lowney*, 831 F.2d 1368, 1371 (7th Cir. 1987); *Hodge v. Police Officers*, 802 F.2d 58,60 (2d Cir. 1986); *In re Lane*, 801 F.2d 1040, 1043-44 (8th Cir. 1986);

McCarthy v. Weinberg, 753 F.2d 836, 839 (10th Cir. 1985). Other courts have concluded that counsel need be appointed only in "exceptional circumstances." *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 799 (9th Cir. 1986). The exceptional circumstances test has been merged with factors similar to those used in *Maclin* in at least one circuit. *Bemis v. Kelley*, 857 F.2d 14, 15-16 (1st Cir. 1988).

The number of cases that will be assigned to pro bono counsel is thus limited by the interpretation of §1915(d) by the courts. The number of cases placed in Iowa demonstrates that the burden imposed, although it can be significant in individual cases, is not oppressive. The VLP began placing federal referrals in February of 1986. In 1986, 73 cases were placed; 99 cases were placed in 1987; and 87 cases have been placed in 1988 through November 30, 1988.[3] The appointment of attorneys from the alphabetical list begun in February of 1986 did not conclude until September of 1988. No attorneys have been asked to participate in the appointment process more than once since the system was inaugurated. In addition, attorneys who previously agreed to participate in the VLP panel are exempted from participation. The assumption underlying the program is that attorneys will not be appointed more than once every five to six years, because attorneys who had performed pro bono services the first time through the list would not be appointed to serve the second time the list was used.

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[3] This figure represents only those cases placed by the VLP. There may be some cases, particularly when the referral system was first becoming operational, that were placed by the clerk of the district court.

B. Appointment Under §1915(d) Insures The Right Of Access To The Courts Is Preserved For Indigent Civil Litigants.

When the burden placed on licensed attorneys is juxtaposed with the effective denial of access to the courts caused by the absence of counsel, the decision of the Eighth Circuit to view appointment under §1915(d) as mandatory is further strengthened. Although the assistance of counsel is constitutionally protected only in criminal matters:

> The actual concerns of the poor do not reflect the law's sharp distinction between civil and criminal litigants. Poverty only magnifies the importance of protecting one's property from seizure by legal process. The poor man may be evicted, his furniture may be repossessed, his welfare payments cut off, his children taken from him.

Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967). While §1915(d) applies to all civil cases, most requests for the appointment of counsel in §1915(d) situations will arise in the prison context. Despite the difficulties that this may cause:

> we must bear in mind that unpopular and even obstreperous litigants are entitled to the full measure of their legal rights. We must be particularly careful that civil rights litigants are afforded their full rights and that neither the unpopularity of their cause nor any perceived belligerency on their part, or other unwillingness or inability to conform to a normal mode, underlies or plays any part in a failure to appoint counsel.

Bradshaw v. U.S. District Court for the Southern District of California, 742 F.2d 515, 519 (9th Cir. 1984) (Reinhardt, J., concurring).

The right of access to the courts has been deemed to be one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907), this Court acknowledged the importance of access to the courts, and described the right of access in the following manner:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

The Court in *Chambers* premised the right of access on the privileges and immunities clause of article 4 of the Constitution and the fourteenth amendment. The right of access has also been predicated on the first amendment right to petition for redress of grievances. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court concluded that the right to petition "extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition." 404 U.S. at 510.

Access rights have also been premised on the due process clause of the fourteenth amendment. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court noted that access to the courts by prisoners was not limited to preparation of petitions for habeas corpus. The right of access to the courts, according to *Wolff*:

> is founded on the Due Process Clause and assures that no person will be denied the opportunity to

> present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.

418 U.S. at 579. The right of access to the courts, regardless of whether it is premised on privileges and immunities, the first amendment, or due process, insures that disputes will be resolved in a fair and impartial manner, without the necessity for disruptive action.

In order to fully implement the right of access to the courts, the access granted must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). In *Bounds*, the Court canvassed its decisions that had helped insure increased access to the courts for prisoners, *id.* at 822-823, and concluded that "meaningful access" to the courts was the touchstone. *Id.* at 823, citing *Ross v. Moffitt*, 417 U.S. 600, 611, 612, 615 (1974). The Court held that the constitutional right of access to the courts required prisons to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828.

Meaningful access to the courts is at the heart of 28 U.S.C. §1915(d), and encompasses the appointment of counsel in certain clearly delimited situations. The State Bar of California notes, in its *amicus curiae* brief, that the concern prompting passage of §1915(d) was that access to the courts not be denied for lack of sufficient funds. Brief at 4, n.3. Access to the courts, however, encompasses more than merely being allowed to file a complaint in the federal

courts. The "meaningful access" that is the touchstone of the constitutional right of access to the courts must be sufficient to insure that the plaintiff can not only file his complaint, but can prosecute his claims in an effective and fair manner. Mere physical access to the courts, without the appointment of counsel, is not necessarily meaningful, effective, or adequate access. "To a prisoner without counsel, §1915 [42 U.S.C. §1983] provides no remedy at all." *Representation of Pro Se Civil Litigants in the Federal District Court Through the Pro Bono Panels*, 43 Rec. A.B. City N.Y. 933, 941 (1988).

The Second Circuit has recognized that §1915(d) "must be understood to guarantee indigents 'meaningful access' to the courts as required by the Constitution." *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986). The court also acknowledged that meaningful access did not mean that counsel must be appointed in every civil case. *Id.* In discussing the necessity of appointments, however, the court concluded that a district court must exercise its discretion to appoint counsel in light of the rules that have been developed in the circuit courts to determine whether the appointment of counsel is necessary. *Id.* at 61-62.

The rules developed by the circuit courts have clearly indicated that counsel will not be appointed merely because a claim passes the "non-frivolous" test of 28 U.S.C. §1915(d). *Lane*, 801 F.2d at 1043; *Poole*, 819 F.2d at 1028; *Howland v. Kilquist*, 833 F.2d, 639, 646 (7th Cir. 1987); *McCarthy*, 753 F.2d at 839. Recognition of this fact severely reduces the number of claims that will lead to the appointment of counsel under §1915(d). The courts have

recognized that counsel need not be appointed unless certain criteria have been met, *see Maclin*, 650 F.2d at 887-888; "exceptional circumstances" are present, *see Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *Bemis*, 857 F.2d at 15; or where the denial of counsel would lead to a "fundamentally unfair" trial for the person seeking the appointment of counsel, *see McCarthy*, 753 F.2d at 839, 840; *Whisenant*, 739 F.2d at 163; *Childs v. Duckworth*, 705 F.2d 915, 922, (7th Cir. 1983).

The criteria developed by the courts have so narrowed the range of cases for which counsel will be appointed that the burden of appointment to which petitioner and amici object so strenuously has been minimized. The U.S. District Court for the Southern District of Iowa, in adopting a system which attempts to equitably apportion the burden placed on individual attorneys, has further minimized the expectations placed on those attorneys. Under these well-developed rules, appointment does not occur in every in forma pauperis case, nor is appointment a recurring phenomenon. In fact, as discussed above, the total number of appointments in the 34 month history of the Southern District of Iowa's federal referral effort has been only 259 cases, an average of only seven to eight cases per month. Attorneys are, at a maximum, appointed to serve in §1915(d) cases only once every five to six years, certainly not an unreasonable burden.

The factors used by the courts in determining whether counsel should be appointed are an explicit recognition that the assistance of counsel is often a necessity for the right of access to be meaningful. The factors focus on the

complexity of the legal and factual issues presented in the complaint and on the ability of plaintiff to represent himself in court. Only where the issues presented are sufficiently complex, or where there is doubt as to the plaintiff's ability to represent himself, will counsel be appointed. In other words, only where the absence of counsel would impede the right of access to the courts is appointed counsel necessary.

The importance of counsel in both civil and criminal cases was stated forthrightly in *Powell*, 287 U.S. at 68-69:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

See Gideon, 372 U.S. at 344-345. Lawyers, who act "as assistants to the court in search of a just solution to disputes," *Cohen v. Hurley*, 366 U.S. 117, 124 (1961), should be aware of the importance of the assistance of counsel in insuring meaningful access to the courts. The outcome of court proceedings, both civil and criminal, will often turn on the presence and adequate assistance of counsel, without whom a fundamentally fair trial may be denied. *Whisenant*, 739 F.2d at 162. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice." *Penson v. Ohio*, 57 U.S.L.W. 4020, 4022 (U.S. Nov. 29, 1988).

C. The Financial And Time Burdens Imposed By Appointment Will Not Lead To A Lack Of Conscientious Representation.

The State Bar of California, proceeding as *amicus curiae* in support of petitioner, argues that access to the courts will not be advanced by compelling attorneys to perform mandatory pro bono work in federal cases. The State Bar's argument is that substantial financial burdens are imposed on counsel in undertaking pro bono cases, that counsel who lack the financial and time resources to represent a client competently have good cause to decline appointment, and that attorneys must decline appointment if the attorney cannot be a "conscientious advocate on behalf of the client." Brief at 15.

The State Bar's protestations rest on the premise that lawyers will gladly perform pro bono service if requested, and will perform in a competent and effective manner the services required. If "appointed" to do so, however, these same attorneys will find the cases to which they have been

assigned too complex and time-consuming, and will be unable to conscientiously represent their clients. The State Bar's argument, if its premise were sound, would obviate consideration of the issues presented in this case. Lawyers would volunteer to perform pro bono work to the extent that all cases being filed by pro se indigent litigants would be handled by volunteer attorneys. The difficulty with the premise is that mandatory appointment has arisen precisely because voluntary systems have proven to be ineffective in allowing indigent litigants meaningful access to the courts in the form of representation by counsel. [4]

The State Bar notes that there are numerous financial disincentives to performing mandatory pro bono services. Assuming for the sake of argument that this is true, this does not provide a rationale for the argument that pro bono services may not be compelled by the courts to insure that access to the courts is maintained. Pro bono service, by its very nature, assumes that some negative financial consequences and restrictions on an attorney's time will occur. The State Bar also advances the notion that costs of discovery will be prohibitive for attorneys made to handle pro bono cases. The State Bar fails to recognize that under the federal referral process in Iowa, attorneys representing

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[4] *See generally* 43 Rec. A.B. City N.Y. 933, in which the Committee on Legal Assistance of the New York City Bar notes the difficulty in attracting volunteers to handle the civil rights complaints of indigent individuals. The Committee notes, in a report prepared in August of 1988, that cases filed as long ago as 1982 had still not been placed, and that 28.4% of the cases pending placement with a volunteer attorney were filed before 1986. *Id.* at 933.

indigent litigants will be reimbursed for their out-of-pocket litigation costs, obviating any concern over this issue. Finally, the State Bar cites to the specter of cases which will involve thousands of hours of efforts on the part of the attorney who has been appointed. Citation is made only to class action cases involving general attacks on the conditions of confinement at various institutions. Brief at 10. The brief of *amicus* seriously overstates the necessary time commitment of counsel in pursuing a pro bono appointment. None of the cases that have required appointment in the Southern District of Iowa have been class actions, and the State Bar Association's argument on this point is hyperbole. As the Committee on Legal Assistance of the New York City Bar Association notes, "(i)ndividual prisoner complaints are *not* so complicated that they require an enormous drain on a firm's personnel and resources." 43 Record A.B. City N.Y. at 942 (emphasis in original).

Amicus also argues that the lack of time and expertise on the part of appointed counsel may hinder the access of indigent litigants. The State Bar notes that in order to perform legal services competently, a member of the bar must adequately know the law and must "undertake reasonable research to ascertain relevant legal principles and to make an informed decision as to a course of conduct and theory of law, based upon an intelligent assessment of the problem." Brief at 12-13. While this is certainly an adequate statement of the responsibilities of an attorney who has been appointed, the brief does not make clear why most appointed attorneys would not be competent to perform these functions. In Iowa, for example, LSCI has provided a number of free seminars concerning §1983 prison litigation, involving both national and state experts in the field, for those attorneys who did not feel confident of their abilities in the litigation of §1983 claims. Any problems with competence in this area can be remedied either through research or continuing legal education, assuming the attorney is generally competent.

A final argument made by the State Bar with respect to access to the courts is that a lawyer should decline an appointment if she or he is "unable to be a conscientious advocate on behalf of the client." Brief at 15. The concern of the State Bar is exemplified by the following statements:

> If a lawyer is compelled involuntarily to represent an indigent, there is a potential danger that the lawyer may favor fee-generating cases over non-fee-generating cases. A lawyer who is trying to make ends meet may fail to exert the effort required in the indigent's case, simply because his or her financial problems will not be helped by efforts on a non-fee-generating case. A lawyer who is struggling financially may also be disinclined to investigate potential defenses or spend money required to develop those defenses.

Brief at 16. The assertion of the State Bar does nothing more than point out that certain cases being handled by an attorney may give that attorney more satisfaction than other cases. Presumably, that truism holds whether an attorney has taken a case voluntarily, or has been appointed to represent a pro se indigent litigant under §1915(d). In either case, the formerly pro se litigant will still achieve greater access to the courts than he or she would have without the appointment of counsel.

The decision whether to appoint counsel should not be tested against a standard of whether a lawyer "favors" certain cases in the caseload — that will inevitably occur. Nor can a "conflict of interest" be said to exist simply because the attorney does not wish to accept a mandatory appointment. Model Rule 1.7 of the ABA Model Rules of Professional Conduct provides that a lawyer shall not represent a client if representation "may be materially limited... by the lawyer's own interests,..." Although the Rule would recognize a conflict in certain limited circumstances, conflicts do not occur under the Rule merely because an attorney is philosophically opposed to accepting a mandatory appointment.

In *Waters v. Kemp*, 845 F. 2d 260, 265 (11th Cir. 1988), the court addresses the appointment of counsel to represent an indigent litigant. After noting the duty of lawyers to accept court appointments, *id.* at 263, the court concludes:

> Before we leave the discussion on this point, we should note that virtually every lawyer who responds to a court's call to represent an indigent faces a financial loss. He may not be paid at all. If he is paid, the amount he receives may be considerably less than what he would have received had he devoted his time and effort to more lucrative work. He accepts the call because it is his bounden duty to do so, as an officer of the court. We recognize that there may be cases in which counsel's financial loss is likely to be so great that his representation of the indigent would be 'materially limited,' within the meaning of Model Rule 1.7. When that is the situation, counsel should not be appointed.

Id. at 265. The *Waters* court views acceptance of appointment as the norm, with exceptions granted in special circumstances where representation of the indigent litigant would be materially limited. This approach, which looks favorably on appointment, and allows an attorney to forego appointment only in limited circumstances, is to be preferred to the approach suggested by the State Bar of California, which would apparently allow the attorney to escape court-imposed obligations in most every situation. If the attorney can demonstrate that his or her own interests would "materially limit" representation of the indigent client, opting out of the system would be permissible. This is consistent with the present operation of the federal appointment system in the Southern District of Iowa.

The concerns expressed by the State Bar of California are also addressed by the principles enunciated in the Iowa Code of Professional Responsibility. First, the lawyer is to "assist the legal profession in fulfilling its duty to make legal counsel available" under Canon 2 of the Code, a mandate which is totally consistent with the federal referral project. Second, once an attorney has been appointed to represent an indigent claimant under §1915(d), the lawyer is bound to represent this new client in accordance with other provisions of the Code of Professional Responsibility. Among those provisions are the duty to exercise independent judgment on behalf of the client (Canon 5); [5] the

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[5] Ethical Consideration 5-1 provides that "(t) he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." Iowa Code of Professional Responsibility.

duty to represent a client competently (Canon 6); and the duty to zealously represent a client within the bounds of the law (Canon 7).

It should not be assumed that lawyers who are appointed to represent indigent litigants will eschew the requirements imposed on them by the Code of Professional Responsibility. This assumption suggests that appointed attorneys will turn their backs on the long history of service in insuring that access to the courts would be open to all citizens. "Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." *Ohralik v. Ohio State Bar Association*, 426 U.S. 447, 460 (1978). Appointment of counsel under §1915(d) is consistent with this longstanding principle.

CONCLUSION

The decision of the Eighth Circuit Court of Appeals to deny petitioner a writ of mandamus should be affirmed. Mandatory appointment is permissible under 28 U.S.C. §1915(d). Appointment is an essential means of insuring that the constitutional right of access to the courts is preserved for indigent litigants. Although other systems could be designed which would also meet the needs of

individuals who proceed in court in forma pauperis, those systems, even if they were presently operational, would not undercut the courts' power of appointment under §1915(d).

Dated: December 22, 1988

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